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Nos. 81-2147 and 81-2188
(Consolidated)

In The
Supreme Court of the United States
October Term, 1982

THE STATE OF ARIZONA, ET AL.,
Petitioners,

vs.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, ET AL.,
Respondents.

THE STATE OF MONTANA, ET AL.,
Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF PETITIONERS IN NO. 81-2188 FOR LEAVE TO FILE A RESPONSE TO THE UNITED STATES' POST-ARGUMENT MEMORANDUM

AND

RESPONSE OF PETITIONERS IN NO. 81-2188 TO THE UNITED STATES' POST-ARGUMENT MEMORANDUM

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TABLE OF CONTENTS

Pages

Motion of Petitioners in No. 81-2188 for leave to file a response to the United States' Post-Argument Memorandum ____ 1

Response of Petitioners in No. 81-2188 to the United States' Post-Argument Memorandum ____ 3

Introduction ____ 4

Argument ____ 6

Conclusion ____ 10

TABLE OF AUTHORITIES

CASES:

Arizona v. California, — U. S. —, 51 U. S. L. W. 4325 (March 30, 1983) ____ 9

Colorado River Water Conservation District v. United States, 424 U. S. 800 (1976) [*Akin*] ____ 7, 8, 9

Heckman v. U. S., 224 U. S. 413, 444-45 (1912) ____ 9

Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, — U. S. —, 51 U. S. L. W. 4156 (Feb. 23, 1983) ____ 5

U. S. v. District Court in and for the County of Eagle, State of Colorado, et al., 401 U. S. 520 (1971) ____ 7, 8

U. S. v. District Court in and for Water Division No. 5, 401 U. S. 527 (1971) ____ 8

United States v. New Mexico, 438 U. S. 696, 702 (1978) ____ 7

TABLE OF AUTHORITIES—Continued

	Pages
Statutory Authorities:	
28 U.S.C. § 1362	4, 5, 7, 8, 9
43 U.S.C. § 666	7, 8, 9
P.L. 280	4, 5, 7, 8, 9

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On March 30, 1983, the United States filed a Motion for leave to file a post-argument memorandum in these cases. That motion was granted by this Court on April 1, 1983. Petitioners in No. 81-2188 opposed the Motion of the United States, and at the same time requested that if the Court decided to grant the United States' motion, that the State of Montana and all other petitioners be allowed to file a responsive memorandum.

The Montana petitioners now respectfully move pursuant to Rule 35.6 of the Rules of this Court for leave to file the attached memorandum in response to the memorandum of the United States.

Respectfully submitted,

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RESPONSE OF PETITIONERS IN NO. 81-2188 TO THE UNITED STATES' POST-ARGUMENT MEMORANDUM

INTRODUCTION

In its post-argument memorandum, the United States re-argues that Indian reserved water rights can, as a practical matter, and should, as a rational and legal matter, be adjudicated separately in federal court. All other water rights, including other federal reserved rights, would be adjudicated in state court under this scheme. The United States, in making its argument, appears to agree with Judge Rifkind's position, as stated during his oral argument in this case, that so long as federal proceedings are commenced by a tribe or tribes or by the United States on the tribes' behalf,[1] and so long as those proceedings deal exclusively with distinct, "encapsulated" Indian reserved water rights, then the federal court is the proper forum to adjudicate the Indian reserved water rights. The United States first argues that such bifurcated proceedings, where the federal court action would be restricted to Indian reserved rights, are workable and practical. The second argument of the United States is that bifurcated proceedings are rational and even congressionally dictated. The United States argues that congressional policy, as evidenced by 28 U.S.C. § 1362 and P. L. 280, insulates Indian water rights, "justify[ing] a federal court in retaining jurisdiction to adjudicate Indian reserved rights while relinquishing to the State

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[1]The federal proceedings in Montana were all initiated by the United States at the request of the various Montana tribes; the federal proceedings in Arizona were initiated by the tribes. The United States alleges that whether it is the tribes or the United States which invokes federal jurisdiction is of no consequence, and that the determining factor is that federal jurisdiction is, in fact, invoked to adjudicate Indian reserved rights.

courts the determination of other federal water rights, even reserved rights."[2] (U. S. Post-Argument Memorandum 8).

The most that can be said for the United States' first argument is that it may, in fact, be *possible* to segregate out Indian reserved water rights and to deal with them in federal proceedings while all other water rights in the state are adjudicated in state court. That it is *possible* begs the question posed in these cases (namely whether the district court abused its discretion in deferring to state court adjudication), and ignores the many problems and questions which stem from such restricted proceedings. More importantly, Congress has evaluated the proposals and issues presented in these cases, and has spoken in favor of unified proceedings in a single forum. This Court has interpreted Congress's intent in passing the McCarran Amendment as preferring unified proceedings in a state forum, notwithstanding Congress' later enactment of 28 U. S. C. § 1362 and P. L. 280. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, — U. S. —, 51 U. S. L. W. 4156, 4160 (Feb. 23, 1983).

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[2]The United States ignores the fact that the district court did *not* exercise its discretion in this manner. It exercised its discretion by dismissing the federal suits in favor of Montana's on-going state-wide water adjudication proceedings.

ARGUMENT

The United States insists that its proposal for bifurcated proceedings is workable and practicable. Yet the United States does not answer the serious questions posed by the State of Montana. Montana Br. 35; oral argument of the Attorney General for the State of Montana. In touting the practicality of its proposals the United States does not respond to the severe problems with them as identified by Arizona. Arizona Reply Br. 14-17. The United States ignores the fact that Congress has decided that a single comprehensive water proceeding in a state forum — particularly in the western states — is the best answer to the sorts of problems and questions posed by both Arizona and Montana.

In addition to failing to answer the states' questions and problems, and disregarding the pronouncements of Congress and of this Court favoring unified proceedings, the United States now emphasizes as virtues the piecemeal nature of the federal suits.[3] The restrictive, separate nature of the federal suits, in their anticipated amended form in Montana, is what the United States seems to see as the saving grace of federal suits initi-

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[3]The United States had previously argued that the federal cases which it filed in Montana were general stream adjudications which were preferable to Montana's state-wide stream adjudication. The State argued that although the United States characterized its cases as general stream adjudications, they were in fact more like quiet title actions. The State of Arizona, in its Response to the United States' Post Argument Memorandum, accepts the United States' characterization of its cases as currently pled, despite the fact that the United States now proposes to amend its complaints to restrict the federal court proceedings to Indian reserved water rights.

ated by itself or by Indian tribes to determine Indian reserved water rights.

This proposal and perspective have been rejected by Congress. The United States insists that 28 U.S.C. § 1362 and P.L. 280, both of which came after[4] the enactment of the McCarran Amendment, evidence strong Congressional intent to allow Indian tribes broad access to federal courts, essentially overriding the McCarran Amendment. (U.S. Post-Argument Memorandum 8.) In making this argument, the United States ignores Congress's historic deference to state courts and state law whenever federal water rights are to be fit into a state water law system. *See, United States v. New Mexico,* 438 U.S. 696, 702 (1978); Montana Br. 23-26. The United States also ignores the fact that in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976) [cited as *Akin*], this Court held that the McCarran Amendment did include Indian reserved rights. The significance of this goes beyond just the actual holding, for the United States and *amici* Tribes in that case specifically briefed the issue of whether P.L. 280 and/or 28 U.S.C. § 1362 took Indian reserved water rights out of the purview of the McCarran Amendment. *E.g.* United States Br. 58, *Akin;* Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe, *et al.* Amicus Br. 11, 40, *Akin. Akin,* like two earlier cases dealt with by this Court interpreting the scope of the McCarran Amendment—*U.S. v. District Court in and for the County of Eagle, State of Colorado, et al.,* 401 U.S. 520 (1971),

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[4]The United States calls P.L. 280 "contemporaneous" with the McCarran Amendment despite the fact its enactment followed McCarran by more than a year.

and *U.S. v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971) — held that the McCarran Amendment included Indian reserved water rights, despite strong arguments which were presented to this Court to the contrary.[5]

In presenting its argument that 28 U.S.C. § 1362 and Public Law 280 indicate a congressional policy to exclude Indian reserved water rights from the ambit of the McCarran Amendment, the United States chooses to ignore one other significant fact. This is that at least since *Eagle County*, the United States and Indian tribes have recognized that Indian reserved water rights are included in the McCarran Amendment and can be adjudicated in state general stream adjudication proceedings. This fact has troubled the United States and tribes, just as it apparently did in 1951, when the United States requested that Indian reserved rights be excluded from the McCarran Amendment's coverage. And, as in 1951, the United States has made specific requests to Congress since the passage of P.L. 280 and 28 U.S.C. § 1361 to allow Indian reserved water rights to be determined in restricted, segregated federal proceedings. Some of these requests and actions have been described already to this Court in detail in *Akin*, both at oral argument by petitioners' attorney, and in petitioners' Reply Brief at

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[5]The State of Colorado in its reply brief in *Akin*, at pages 30-45, painstakingly documented for this Court that *Eagle County* and *Water Division No. 5*, included Indian reserved water rights in their holdings that federal reserved rights were included in the McCarran Amendment. In *Akin*, this Court agreed that "the logic of those cases clearly extends to [Indian reserved water] rights," and that "*Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the [McCarran] Amendment." (citation omitted) 424 U.S. at 810.

pages 38-45 in *Akin*. Congress has not modified the McCarran Amendment as a result of these urgings. Apparently, Congress, like this Court, does not read Section 1362 as necessitating federal forum for Indian reserved water rights.

The United States in its post-argument memorandum presents its argument on the force and thrust of P.L. 280 and Section 1362 as though they are fresh. In fact they are arguments which Congress has refused to act upon and which this Court has rejected. They should be rejected once again.

In the Montana cases, the Montana tribes' reserved water rights are now included in Montana's state-wide stream adjudication proceedings. The United States has filed protective reserved water right claims for the Montana tribes in the state proceedings. The United States' action as the tribes' representative will bind the tribes, *Heckman v. U.S.*, 224 U.S. 413, 444-445 (1912).[6] The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation have filed two protective general water claims on their own behalf in Montana's proceedings.[7] Additionally, the tribes may move to participate in the on-going adjudication of their water rights in

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[6]Less than two weeks ago, this Court reiterated that this holding of *Heckman* "has not been undermined, let alone 'repudiated' by subsequent cases. . . ." *Arizona v. California*, — U.S. —, 51 U.S.L.W. 4325, 4331 n. 20 (March 30, 1983).

[7]Mr. Pelcyger's assertion during oral argument that no Montana tribes had filed water claims in the state proceedings is wrong.

the state forum through intervention.[8] Under these circumstances especially, the United States' proposal to segregate Indian reserved water rights from the adjudication of all other water rights in Montana's adjudication process should be rejected again by this Court.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

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[8] The Attorney General for the State of Montana stated in response to a question from the bench during oral argument that the State had no objection to intervention in the state proceeding by the tribes.